No. 97-1636

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

SOUTHERN CALIFORNIA OFF-TRACK WAGERING, INC., et al.,

Petitioners,

vs.

CABAZON BAND OF MISSION INDIANS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Despite Petitioners' attempt to inject into this petition the merits of the arguments that they would have presented had the district court not denied their motion to intervene, the *only* question fairly presented by the petition is:

Did the district court abuse its discretion in denying the Petitioners' motion to intervene when all of the following factors were present:

1. Petitioners knew about this action and the issues involved from its inception more than six years before they filed their motion to intervene;

2. Petitioners delayed filing their motion to intervene for nearly two years after the Court of Appeals ruled on the merits that the Tribes were entitled to the disputed state license fees;

3. Petitioners still delayed filing their motion to intervene by nearly three additional months after the district court on remand ruled that Petitioners were not indispensable parties and that the judgment in favor of the Tribes mandated by the Court of Appeals could proceed;

4. Petitioners knew from the outset, and certainly since October 1, 1994, that *any* judgment could only be in favor of the existing parties, and not in favor of Petitioners under any circumstances; and

5. Petitioners' motion to intervene was filed in unexcused and unexplained violation of Local Rule 6-142(e) of the district court?

LIST OF PARTIES TO THE PROCEEDING

Del Mar Thoroughbred Club

Hollywood Park, Inc.

Los Angeles Turf Club

Oak Tree Racing Association

Los Alamitos Race Courts

Los Angeles County Fair

Southern California Off-Track Wagering, Inc. (SCOTWINC)

The foregoing parties will be collectively referred to herein as "SCOTWINC"

State of California

Pete Wilson, as Governor of California

California Horse Racing Board

The foregoing parties will be collectively referred to herein as "the State"

Cabazon Band of Mission Indians

Sycuan Band of Mission Indians

Viejas Band of Mission Indians

Barona Group of Capitan Grande Band of Mission Indians

Unless mentioned by name, the foregoing parties will be referred to herein as "Respondent Tribes"

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STATEMENT OF THE CASE

Petitioners' Statement of the Case contains considerable extraneous and erroneous matter that clearly is intended to distract the Court from the only real issue presented by the Petition. Set forth below is a complete and accurate summary of the *relevant* facts and the *relevant* proceedings below.

A. Nature of the Controversy

This litigation began in 1990 as a dispute between the State of California and the Cabazon Band of Mission Indians over the State's jurisdiction to impose its license fee on the gross daily wagers ("handle") placed at the Cabazon Band's simulcast wagering facility.[1] The Band was authorized to operate its simulcast facility by the terms of a Tribal-State compact (the "Cabazon compact") entered into in 1989 pursuant to the Indian Gaming Regulatory Act of 1988 ("IGRA"), 25 U.S.C. §2701, *et seq.*

Paragraph 19 of that compact acknowledged that the parties could not agree as to the State's jurisdiction to impose that tax,[2] and provided that the dispute would be

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[1] California allows live on-site wagering on horse races both at race tracks where the race is being run, and off-track wagering at other locations which are linked to the live race by the instantaneous electronic transmission of the audio and visual race signals from the live track to these remote "satellite" locations. The arrangement is known as "simulcast" racing and wagering at remote "simulcast" facilities.

[2] See California Business & Professions Code (hereinafter "B&P Code" §§19605.7, *et seq.* for the entire complex allocation scheme).

resolved through a lawsuit to be filed by the Tribe in the appropriate federal district court within one year of the compact's effective date.[3] The Cabazon Band timely filed such a lawsuit in 1990.

Also in 1990, the State entered into a simulcast wagering compact with the Sycuan Band of Mission Indians (the "Sycuan compact"). In most respects, including ¶19, the Sycuan compact was substantially identical to the Cabazon compact. The Sycuan Band filed its lawsuit under ¶19 of its compact early in 1991, and that suit was consolidated with the Cabazon Band's suit for decision.

In 1990, prior to commencing simulcast wagering operations, the Cabazon and Sycuan Bands both entered into the first of a series of annual operating agreements with SCOTWINC[4] and the Racing Associations that actually host the in-State racing meetings that are simulcast to off-track wagering facilities.

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[3] The full text of ¶19 is set forth in Appendix A.

[4] SCOTWINC is the acronym for "Southern California Off-Track Wagering, Inc." SCOTWINC is a non-profit simulcast organization consisting of representatives of horse racing associations, racing fairs and organizations representing race horse owners, organized under the authority of B&P §19608.2 for the purpose, *inter alia*, of facilitating transmission of simulcast audio-visual signals from host racing associations in southern and central California (the "Southern Zone" as defined in B&P Code §19608.2) to off-track wagering facilities, operating the parimutuel wagering system at those facilities and integrating the wagers placed at off-track facilities and the wagers placed at the host track into a single parimutuel pool.

In 1992, while the Cabazon and Sycuan Bands' lawsuits were pending, the Barona and Viejas Bands also entered into substantially identical simulcast wagering compacts with the State of California authorizing those Tribes to operate simulcast wagering facilities. The principal difference between those compacts and the Cabazon compact was that rather than requiring the Barona and Viejas Bands to file additional lawsuits, the parties to those compacts agreed to be bound by the outcome in the Cabazon Band's lawsuit.

The Barona and Viejas Bands entered into their first operating agreements with the host Racing Associations and SCOTWINC in 1992. Those agreements were substantially identical to the operating agreements that the Racing Associations and SCOTWINC had entered into with the Cabazon and Sycuan Bands.

All of the annual operating agreements entered into among SCOTWINC, the Racing Associations and the Tribes and the Racing Associations and the Tribes between 1990 and 1994 contained the same paragraph 5(b):

> In the event that a final judicial determination is made that the State of California cannot impose its state license fee on wagers accepted at the Tribes' facility, Tribe shall be entitled to receive an amount equivalent to the state license fee on the gross amount of wagers at the Tribe's facility. To the date of such final judicial determination, Tribe shall recover such fees from the State, thereafter, such fees shall be paid by Operator [*i.e.*, SCOTWINC] directly to Tribe if Operator is authorized by the State to withhold such sums from the gross amount of wagers accepted at the

> Tribe's facility and to make such payment directly to the Tribe. Otherwise, Tribe shall recover such fees directly from the State.

Thus, there can be no doubt that, as early as 1990, and continuously thereafter, each of the Petitioners was fully aware that under ¶19 of the compacts, the *only possible* outcomes in the Tribes' lawsuits were that the funds at issue would go to either the State or to the Tribes, depending only on whether the imposition of the disputed state license fee was found to be permissible or impermissible under federal law. Under no circumstances does this language in the agreement signed by the Petitioners allow or even contemplate that those disputed state license fees would go to the Petitioners.

In 1992, the district court granted summary judgment for the State, holding that neither the legal incidence nor the economic burden of the State license fee fell upon the Tribes, and thus that the State's tax was not preempted by IGRA or principles of federal Indian preemption. *Cabazon Band of Mission Indians v. Wilson*, 788 F. Supp. 1513 (E.D. Cal. 1992) (*"Cabazon I"*), *supra*. In October, 1994, the Court of Appeals for the Ninth Circuit, while agreeing with the district court that the legal incidence of the State's tax was on the Racing Associations, rather than the Tribes, nonetheless reversed the district court. The grounds for reversal identified by the Appeals Court included the following: IGRA preempted the State's jurisdiction to deduct its license fee from wagers placed at Tribal simulcast facilities; under IGRA, the compacts – not State law – control the distribution of the "takeouts" from such wagers; and under the compacts, the Tribes were entitled to the State license fees that had been or in the future

would be deducted from wagers placed at Tribal facilities. *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430 (9th Cir. 1994) ("*Cabazon II*").[5] The Ninth Circuit remanded the case to the district court with instructions to enter summary judgment for the Cabazon and Sycuan Bands.

Shortly after the Court of Appeals entered its decision in *Cabazon II*, Petitioners informed respondent Tribes that if the State could not collect its license fee, Petitioners were entitled to retain the money that otherwise would be distributed to the State as a license fee. Respondent Tribes immediately and vigorously disputed this claim. *See*, letter dated November 25, 1994 from SCOTWINC to Mr. Daniel Tucker, Chairman, Sycuan Band of Mission Indians, and letter dated January 6, 1995 from George Forman to SCOTWINC, set forth, respectively, in the Appendix hereto.

The State did not seek review in this Court of the Court of Appeals' decision in *Cabazon II*. Instead, the State simply informed the Tribes that the decision in *Cabazon II* somehow had invalidated the compacts, and that because the Tribes were conducting what the State considered to be other gaming unrelated to simulcast wagering, the simulcast signals to the Tribal facilities would be terminated unless the Tribes ceased those other activities and entered into new simulcast compacts that did not entitle the Tribes to the license fee. Petitioners were fully aware of these developments.

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[5] This opinion, issued on rehearing, superseded the Ninth Circuit's original May, 1994 decision that had reversed the district court on a different preemption theory. *Cabazon Band v. Wilson*, 23 F.3d 1535 (9th Cir. 1994).

In response to the State's threat to discontinue the simulcast signal, the Cabazon and Sycuan Bands sought further relief against the State in the district court pursuant to 28 U.S.C. §2202, and the Barona and Viejas Bands filed motions to intervene accompanied by proposed complaints in intervention. The district court granted the motions to intervene and issued a temporary restraining order, but then determined that in order to enforce the Ninth Circuit's decision in *Cabazon II*, the Tribes would have to file amended complaints seeking to enforce the compacts.

After failing to obtain relief in the nature of mandamus from the Court of Appeals,[6] the Tribes filed their amended complaints in mid-1995. In response, the State asserted various affirmative defenses and counter-claims, including the defense that the Tribes' action should be dismissed under F.R.Civ.P. 19 for failure to join Petitioners as necessary parties. In an April 26, 1996 order, the district court granted the Tribes' motion to strike the State's affirmative defenses, including the Rule 19 defense, finding that the Tribes could obtain complete relief from the State in Petitioners' absence, that Petitioners had not claimed any interest in this action despite having had many years to have done so, and that the State had not explained how either it or Petitioners would be prejudiced by Petitioners' absence.

In the same order, the district court ordered the State to "report to the court within 14 days of the date of this

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[6] The Court of Appeals held that mandamus was inappropriate because the Tribes would have a full remedy on appeal.

order as to how it shall comply with the compacts in light of the ruling by the Court of Appeals." Petitioners' Appendix ("Pet. App.") 53. However, rather than reporting to the district court as ordered, on May 17, 1996, the State filed a motion for reconsideration that was noticed for hearing on July 12, 1996.

More than a month later, on June 27, 1996, Petitioners, by now represented by a former Deputy Attorney General who had represented the State in this action from commencement until late 1995, notified the parties of their intention to seek leave to intervene. On July 3, 1996, Petitioners filed an *ex parte* application to advance the hearing on their motion to intervene from its scheduled date of August 9, 1996, to July 12, 1996, the date scheduled for the hearing on the State's motion for reconsideration.

Contrary to the express requirements of Local Rule 6-142(e),[7] Petitioners did not even attempt to explain why they had waited more than two months after the district court's April 26, 1996 ruling to file their motion to intervene, or why they suddenly needed an order shortening time for which they could not obtain a stipulation from other counsel. As a practical matter, it would have been

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[7] L.R. 6-142(e) requires, in pertinent part, that an application for an order shortening time "shall set forth by affidavit of counsel the circumstances claimed to justify the issuance of an order shortening time. Ex parte applications to shorten time will not be granted except upon affidavit of counsel showing a satisfactory explanation for the need for the issuance of such an order and for the failure of counsel to obtain a stipulation for the issuance of such an order from other counsel or parties in the action."

impossible for Petitioners to offer a satisfactory explanation why they had delayed seeking intervention for nearly two years after the Ninth Circuit's October, 1994 decision in *Cabazon II*, seven months after the State filed amended answers asserting as an affirmative defense the Tribes' failure to join Petitioners, and more than two months after the district court had found that Petitioners were not indispensable to the just adjudication of this action among the existing parties.

On July 11, 1996, the district court entered its Memorandum and Order denying the motion to intervene as untimely. The district court explained that,

> The motion comes very late in these proceedings and long after proposed intervenors should have known about any interest they may have in the outcome of this litigation. Accordingly, the motion is DENIED as untimely. F.R.Civ.P. 24; *Engra, Inc. v. Gabel*, 958 F.2d 643, 644-45 (5th Cir. 1992).

Pet. App. 54.

The district court proceeded to enter a final judgment in favor of respondent Tribes, and both the State and Petitioners filed notices of appeal. The Court of Appeals affirmed both the district court's judgment on the merits and the denial of Petitioners' motion to intervene.[8] *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050 (9th

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[8] "Having made the strategic decision to rely on the State to advance their interests, the Applicants opted to delay moving to intervene in this litigation until long after they should have realized not only that their asserted interest was at stake, but also that their interest had diverged from the State's. They must

Cir. 1997) ("*Cabazon III*"). It is this judgment that Petitioners now petition this Court to review.

REASONS FOR DENYING THE WRIT

A. The Decision of the Court of Appeals is Fully Consistent with the Decisions of this Court.

While the denial of a motion to intervene technically may be the subject of a petition for writ of certiorari, as contended by Petitioners, this Court seldom has granted a petition for writ of certiorari on the question whether a district court abused its discretion in denying a motion to intervene except in extremely unusual and compelling circumstances. For example, in *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corporation*, 510 U.S. 27, 29 (1993), cited by Petitioners, the Court observed that,

> While the decision on any particular motion to intervene may be a difficult one, it is always to some extent bound up in the facts of the particular case. Should we undertake to review the Court of Appeals' decision on intervention, it is unlikely that any new principle of law would be enunciated, . . . The Court of Appeals' disposition of petitioner's motion to intervene is simply not such a question.

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now live with the ramifications of their delay. They waited too long, and their application for intervention was untimely. The district court's decision to block intervention that late in the litigation was not an abuse of discretion."

Cabazon III at 1062, Pet. App. 26.

Unlike *Izumi, supra,* the Court granted certiorari in *United Auto Workers v. Scofield,* 382 U.S. 205, 209 (1965), also cited by Petitioners, to decide an important question that had split the federal Circuits: *i.e.,* whether a person or entity that was not a party to a proceeding before the National Labor Relations Board, but who/which might be adversely affected by the decision of the Court of Appeals reviewing the NLRB's decision, had a right to intervene in the Court of Appeals' review of the NLRB decision. No such important question, and no such split among Circuits, is present in this case.

This Court long ago established, and has not since deviated from, the principle that a district court's denial of a motion to intervene pursuant to F.R.Civ.P. 24, even as of right, is reviewable solely for abuse of discretion. *NAACP v. New York,* 413 U.S. 345 (1973). The Ninth Circuit consistently follows exactly the same rule. *See, e.g., United States v. State of Washington,* 86 F.3d 1499 (9th Cir. 1996); *see also, County of Orange v. Air California,* 799 F.2d 535 (9th Cir. 1986); *Empire Blue Cross and Blue Shield v. Janet Greeson's A Place for Us, Inc.,* 62 F.3d 1217 (9th Cir. 1995);[9] *League of United Latin American Citizens v. Wilson,* 131 F.3d 1297 (9th Cir. 1997).[10] Moreover, that is precisely the standard of review that the Court of Appeals applied

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[9] "It seems inequitable to allow a latecomer, who fiddled while Rome burned, to collect a share of the fire insurance."

[10] "This appeal simply reveals a case of 'too little, too late.' ACNFARI slept on its intervention rights for more than two years. When it awoke, it was unable convincingly to explain its delay. The district court was correct to deny its motion."

in this case. *Cabazon III*, 124 F.3d 1050, at 1061, Pet. App. 26.

Although the district court may not have set forth in detail the reasons why it determined that Petitioners' motion to intervene was untimely, the record before the district court provided ample evidence that Petitioners had inexcusably delayed in asserting claims about which they had been aware for years, and which they could have asserted at any time during the more than *six years* that the action had been pending up to that point. Moreover, in affirming the district court, the Court of Appeals was not limited to the specific ground(s) relied upon by the district court. *Fosson v. Palace (Waterland), Ltd.*, 78 F.3d 1448 (9th Cir. 1996).

The Court of Appeals noted that the interest that Petitioners belatedly attempted to assert in their motion to intervene "was apparent early in this litigation[.]" and

> Moreover, under the terms of the Compacts, of which the Applicants were aware, it is clear that the State and the Bands agreed that the State would continue to collect the fees from the racing associations, regardless of whether the court found them permissible under IGRA. Paragraph 19(B)(2) and 19(B)(3) clearly contemplate that either the State or the Bands would receive those fees.

Cabazon III, at 1061, Pet. App. 26.

Finally, the Court of Appeals found that,

> Assuming arguendo that the Applicants had no immediate interest in the original litigation, surely they should have known what was in the

> offing after our October 1, 1994 decision in *Cabazon II* and after the district court, on July 12, 1995, ordered the Bands to file a new complaint to enforce Paragraph 19(B)(3). . . . Nonetheless, the Applicants waited and watched. . . . Thus, by the time the Applicants moved to intervene on July 3, 1996, the district court had already directed the State to pay the fees to the Bands, effectively resolving the dispute. Even if the court had granted the intervention, the Applicants would only have been able to participate in the motion for reconsideration.

Cabazon III, at 1061-62, Pet. App. 26.

There simply can be no doubt that the district court properly exercised its discretion to deny intervention, given the fact that if Petitioners seriously believed that they had any colorable right to the disputed fees in the event that the imposition of the fees might be ruled impermissible, Petitioners could – and should – have moved to intervene even before the Court of Appeals ruled in October, 1994 that the Tribes are entitled to the disputed license fees. Thus, Petitioners had absolutely no excuse for not seeking intervention after the October 1, 1994 decision of the Court of Appeals became final and the case was remanded to the district court for entry of summary judgment for the Tribes.

By the time that Petitioners finally moved to intervene, more than a year had elapsed since the State had begun its effort to abrogate the compacts. A year had elapsed since the district court had ruled that the Tribes would have to file amended complaints and complaints in intervention to enforce the compacts, and that the State would be allowed to assert affirmative defenses and

counterclaims, including that Petitioners are indispensable parties. By the time Petitioners notified the existing parties of their intention to seek intervention, the legal issues had been completely reviewed and resolved by the district court, and all that remained for the district court to do was to deny the State's baseless motion for reconsideration and enter the judgment the Tribes had been seeking since 1990, and to which the Tribes had been entitled since October 1, 1994.

To have granted the motion for intervention at that point would have subjected the Tribes to further lengthy delays, substantial additional litigation-related expenses and fees, and further postponement of receipt of revenues needed to fund the operation of their Tribal governments and provide governmental services to their Reservation communities. These delays, additional expenses and deprivation of substantial revenues to which the Tribes were and are entitled, would have clearly prejudiced respondent Tribes.

B. Petitioners Improperly Attempt To Raise Issues that were not Raised or Decided Below.

Most of the Petition consists of the arguments that Petitioners hoped to make on the merits of their claims if the district court had granted their motion to intervene. However, because the motion to intervene was denied as untimely, the district court neither reached nor ruled on the merits of any of these arguments, although the Court of Appeals described the existence of Petitioners' claimed interest as "questionable." *Cabazon III*, at 1061 n.3, Pet. App. 26.

It has long been this Court's rule that this Court will review only those questions that were properly raised by the parties in the courts below. *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam). Petitioners should not now be allowed to argue the merits of their illusory claims made in its Petition.

The Court of Appeals actually gave Petitioners far more solicitude than they deserved. Neither under State law, the actual language of ¶19 of the Compacts,[11] nor the positions taken by the existing parties,[12] has there ever

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[11] The language of ¶19(B) of the Cabazon Compact is set forth in the Court's Opinion in *Cabazon III*, 124 F.3d at 1050. Paragraph 19(B)(3) of the Sycuan Compact provides as follows:

> In the event a final judgment is obtained the deduction and distribution of a state license fee is impermissible under the Act, and following the exhaustion of all appellate review, the State shall pay over to Sycuan the amount of the state license fee previously distributed to the State under this Compact, exclusive of the assessments due and owing under subparagraph (4) below, and Sycuan shall thereafter be entitled to receive an amount equivalent to the state license fee from all wagers at the Sycuan simulcast wagering facility. The amount of state license fee previously distributed to the State and not reasonably claimed by the State as due and owing from the commencement of operation of the facility, and such pre- or post-judgment interest, if any, as the Court may determine, shall be paid over to Sycuan as soon as practicable, and in any event not later than sixty (60) days following the entry of final judgment.

[12] The State has argued from the beginning that its tax is on the Racing Industry and thus is not impermissible under IGRA. The Tribes have argued from the beginning that the State's tax on wagers at the Tribes' simulcast facilities is impermissible

been any possibility that Petitioners might be entitled to the windfall that they sought by its untimely application for intervention. Conversely, IGRA specifically authorizes the result of both *Cabazon II* and *Cabazon III*, in that 25 U.S.C. §2710(d)(3)(C)(iv) specifically contemplates the shifting of taxation of on-Reservation Class III gaming activity from the State to Tribes.[13] That is, in effect, exactly what the State and the Tribes agreed in these Compacts, and that is why *Cabazon II*, the district court and *Cabazon III* all determined that the Tribes – and thus not Petitioners – are entitled to an amount equal to past and future State license fees on the gross handle of wagers at the Tribes' simulcast facilities.

Petitioners' reliance on cases dealing with post-judgment motions to intervene in class actions (*United Airlines*

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under IGRA regardless of the legal incidence of the tax, that IGRA allows the State and the Tribes to alter the State's statutory distribution formula so that the Tribes will receive the tax that the State otherwise would receive, and thus that under the Compacts, the Tribes are entitled to receive an amount equivalent to the State tax on bets at their facilities.

[13] That section provides in relevant part:

> Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to –
>
> (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities . . .

Thus, under *Cabazon II*, if the State cannot tax wagers placed at the Tribes' facilities, the State and the Tribes may agree in their Compacts that the Tribes may do so.

v. McDonald, 432 U.S. 385 (1977)), allowance of intervention when an existing party that had represented an intervenor's interest suddenly changes its position to the intervenor's detriment (*Legal Aid Society of Alameda v. Dunlop*, 618 F.2d 48, 50 (9th Cir. 1980), *Pellegrino v. Nesbit*, 203 F.2d 463 (9th Cir. 1953)), and cases involving new and distinct phases of ongoing litigation that create materially changed circumstances (*United States v. Oregon*, 745 F.2d 550 (9th Cir. 1984)), for the proposition that the mere passage of time does not render intervention untimely, is completely misplaced. In each of those cases, the court was able to find that the applicant's delay in seeking intervention not only had not prejudiced the existing parties, and that granting intervention would not result in the relitigation of matters already settled between the existing parties, but that the applicant could not reasonably have been expected to intervene sooner.

In this case, absolutely nothing prevented Petitioners from intervening at the outset of the litigation. Moreover, because the existing parties' respective theories of the case would not have allowed any recovery by Petitioners, not even the State can be said to have represented Petitioners' claimed interest. Therefore, notwithstanding the leniency to be shown toward intervenors as of right, Petitioners' utter failure to offer any credible justification for more than six years of deliberate inaction amply supports the district court's exercise of its discretion to deny intervention.

In hindsight, Petitioners may have "bet on the wrong horse" by sitting back and letting the State represent their purported interest in the license fees, but that is the

choice that Petitioners freely made, and they must now live with the consequences of that choice.

C. The Grounds for the Petition are Precluded by the Law of the Case.

The doctrine of the law of the case "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. *Arizona v. California*, 460 U.S. 605, 618 (1983). The Ninth Circuit interprets and applies this jurisprudential doctrine so as to require the decision of an appellate court on a legal issue to be followed in all subsequent proceedings in the same case. *In re Rainbow Magazine, Inc.*, 77 F.3d 278 (9th Cir. 1996); *Kimball v. Callahan*, 590 F.2d 268, 771 (9th Cir. 1974), *cert. denied*, 444 U.S. 826 (1979);[14] *see also, Jeffries v. Wood*, 114 F.3d 1484 (9th Cir. 1997, en banc).[15]

The law of the case doctrine is not absolute, in that the prior decision should be followed unless 1) the decision is clearly erroneous and its enforcement would work a manifest injustice, 2) intervening controlling authority

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[14] "[U]nder the 'law of the case' doctrine one panel of an appellate court will not as a general rule reconsider questions which another panel has decided on a prior appeal in the same case."

[15] "Law of the case rules are founded upon 'the sound public policy that litigation must come to an end. An appellate court cannot efficiently perform its duty to provide expeditious justice to all if a question once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal.' " *Id.*, at 1489.

or statute makes reconsideration appropriate, or 3) substantially different evidence was adduced at a subsequent trial. *Jeffries v. Wood, supra,* at 1489. None of those exceptions apply in this case.

Respondent Tribes' entitlement to the disputed State license fees was established in *Cabazon II,* and that entitlement, which has not been shown to have been clearly erroneous, became final in January, 1995 when the State failed to petition this Court for a writ of certiorari. No intervening change in the law or facts justifies discarding the six years of litigation between the State and the Tribes that preceded Petitioners' belated application for intervention. Petitioners did not offer any evidence that was not presented or available to the lower courts in *Cabazon I, Cabazon II* and the petitions for rehearing filed in the Court of Appeals.

For Petitioners to prevail on their claim to the disputed fees, this Court would have to allow Petitioners to completely relitigate the central issue that was finally decided in *Cabazon II.* No reason exists in law, logic or justice to accommodate Petitioners' belated desire to reap an unanticipated and undeserved windfall.

CONCLUSION

For all of the above reasons, the Court of Appeals was correct in determining that the district court did not abuse its discretion in denying Petitioners' motion to intervene as untimely, and no substantial federal question is presented to this Court for review.

Dated: May 12, 1998

Respectfully submitted,

GLENN M. FELDMAN
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ART BUNCE
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Attorneys for the Sycuan Band of Mission Indians

JOHN WINKLEMAN
Attorney for the Viejas Band of Mission Indians

[LOGO] ***Southern California Off-Track Wagering, Inc.***

[LOGO]

November 25, 1994

Mr. Daniel Tucker, Chairman, Tribal Business Committee
Sycuan Band of Mission Indians
5459 Dehesa Road
El Cajon, CA 92019

RE: *Simulcast and Parimutuel Operations Agreement*

Dear Mr. Tucker:

As you know, the Simulcast and Parimutuel Operations Agreements for the 1994 racing year (the "Simulcast Agreements"; capitalized terms contained herein have the meaning set forth in the Simulcast Agreements) by and among Southern California Off-Track Wagering, Inc. ("Operator"), the Sycuan Band of Mission Indians ("Tribe") and each of the organizations listed on Exhibits A thereto during the period of their racing meet ("Track"), expire at the end of the race meets currently in progress (December 17, 1994 for Night Racing and December 24, 1994 for Daylight Racing). In connection with the upcoming negotiations regarding the renewal of the Simulcast Agreements, Operator proposes that Section 5(b) of the Simulcast Agreements be deleted in its entirety.

In the event Tribe's challenge to the permissibility of the state license fee deducted for the total wagers at Tribe's simulcast facility is successful, Operator does not

agree to be obligated to pay to Tribe an amount equal to such state license fee. Whether Tribe is entitled to receive an amount equal to the state license fee is solely a matter between Tribe and the State of California. Tribe should, as required by the Compact, look to the State of California for any such payment and not to Operator. In fact, a requirement that Operator make such payment is inconsistent with the terms of the Compact.

Furthermore, under the California Horse Racing Law, if the State of California cannot impose its state license fee on wagers accepted at Tribe's facility, the amount deducted for such fee would be surplus revenue to be divided equally between the applicable racing association and the horsemen. Operator does not believe that the California Horse Racing Board (in its capacity as the Compact negotiator for the State of California) has the right or authority to unilaterally change the operation of the California Horse Racing Law (i.e. by negotiating away revenue that otherwise would have been shared between the applicable racing association and the horsemen) without proper legislative action.

Operator looks forward to another year of operating and administering the simulcast wagering system at Tribe and to finalizing the renewal of the Simulcast Agreements with you shortly. If you have any questions regarding the matters discussed herein please do not hesitate to call me at (714) 761-1660.

Very truly yours,

/s/ Alvin A. Karwacki
General Manager

cc: George Forman Craig Fravel Lawrence Goldman

LMG/ajc

ALEXANDER & KARSHMER

ATTORNEYS AT LAW

(A PARTNERSHIP INCLUDING A
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[Names Omitted In Letterhead]

January 6, 1995

VIA TELECOPIER AND U.S. MAIL

Alvin A. Karwacki, General Manager
SCOTWINC
4961 Katella Avenue
Los Alamitos, CA 90720-2799

Re: Simulcast and Parimutuel Operations Agreement

Dear Mr. Karwacki:

In your November 25, 1994 letter concerning the renewal of the Simulcast Agreements for the coming racing year, you proposed that Section 5(b),[1] pertaining to

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[1] In the event that a final judicial determination is made that the State of California cannot impose its State license fee on wagers accepted at Tribe's facility, Tribe shall be entitled to receive an amount equivalent to the State license fee on the gross amount of wagers accepted at Tribe's facility. To the date of such final judicial determination, Tribe shall recover such fees from the State; thereafter, said fees shall be paid by Operator directly to Tribe if Operator is authorized by the State to withhold such sums from the gross amount of wagers accepted at Tribe's facility and to make such payment directly to Tribe. Otherwise, Tribe shall recover such fees directly from the State.

the contingent Tribal entitlement to an amount equivalent to the State license fee, be deleted in its entirety, because in the event that the Tribal challenge to the applicability of the State license fee on wagers placed at Tribal facilities is successful,[2] SCOTWINC "does not agree to be obligated to pay to Tribe an amount equal to such state license fee."

Your letter gave four justifications for SCOTWINC's position:

1) the Tribe must look to the State for such payment, rather than to SCOTWINC, as required by the Compact;

2) requiring SCOTWINC to make such payment would be inconsistent with the terms of the Compact;

3) if the State cannot impose its license fee, that amount would be "surplus revenue" that should go the host association and the horsemen; and

4) SCOTWINC does not believe that the CHRB has the right or authority to unilaterally change the operation of the Horse Racing Law without proper legislative action.

We have consulted with legal counsel for the other Tribes that now have Agreements with SCOTWINC, and all concur in our opinion that SCOTWINC's request for deletion of Section 5(b) lacks any basis in law or fact, and thus that Section 5(b) should not be deleted at this time.

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[2] The Cabazon and Sycuan Compacts specifically authorized the Tribes to bring their respective lawsuits.

Indeed, it seems clear to us that once the existing litigation between the State and the Tribe terminates in the Tribes' favor, that Section will need to be revised to affirmatively provide that SCOTWINC shall deduct and pay over to the Tribes the amounts that otherwise would be deducted and paid to the State as license fees.

The Simulcast Agreements do not exist in a void; rather, they must be understood and interpreted in the context in which they were made. In this case, that context includes not only the Horse Racing Law, but also the Tribal-State compacts that were entered into between the Tribes and the State, and which were approved by the Secretary of the Interior. This is a critical point, because in the absence of the compacts – which are authorized and approved pursuant to *federal* law – the Tribes would not be legally entitled or able to operate simulcast wagering facilities at all.

The authority for the Tribes to enter into agreement with, *inter alia*, SCOTWINC to receive simulcast signals and conduct parimutuel wagering on simulcast races is conferred in Article 8(A), which specifically admonishes that,

> No such simulcast organization shall refuse to enter into such an agreement with [the Tribe] on the ground that [the Tribe] is not an entity eligible to be authorized to operate a simulcast wagering facility under state law, or that the proposed agreement with [the Tribe] is otherwise inconsistent with another provision of state law, or with the Rules and Regulations of the Board, *as long as the proposed agreement between [the Tribe] and the simulcast organization complies*

> *with federal law and with the terms of this Compact.* . . . Except as herein provided, nothing in this Compact is intended to alter in any way the rights of the simulcast organization under state law. [Emphasis added].

The meaning and intent of this section of the Compacts could not be clearer: to the extent that federal law and/or Compact provisions differ from State law in defining SCOTWINC's relations with the Tribes, federal law and/or Compact provisions will control that relationship. Thus, under the Compacts, SCOTWINC would have no right to refuse to enter into an agreement with a Tribe, or to include a particular provision in a Simulcast Agreement, merely because entering into an Agreement or agreeing to a particular provision is not authorized by State law, as long as it is not contrary to federal law or the controlling Compact.

Article 19(A) of the Compacts provides that "*Subject to subparagraphs (B) and (C) below,* the amounts deducted from parimutuel wagers at [Tribal facilities], and the distribution of such amounts, shall be the same as provided for under state law for simulcast wagering facilities, other than fairs, in the southern zone." The critical subparagraph (B)(3) provides that if the Tribes prevail in their lawsuit about the State license fee, the State is to pay over to the Tribes all license fees previously distributed to the State (exclusive of a negotiated assessment for actual regulatory costs), and the Tribes "shall thereafter be entitled to receive an amount equivalent to the state license fee from all wagers at the Sycuan simulcast wagering

facility." In other words, if the Tribes prevail, the *distribution* of the amounts deducted from wagers at Tribal facilities will be adjusted so that the amounts previously deducted and paid over to the State as license fees instead wil be deducted and paid over to the Tribes, less an agreed amount to reimburse the State for its regulatory costs.[3]

Based upon the clear language of the Compacts, SCOTWINC's contention that each Tribe's entitlement to receive an amount equal to the State license fee "is solely a matter between Tribe and the State of California[,]" simply is incorrect, as is SCOTWINC's contention that the payment over to the Tribes of amounts equal to the State license fee would be inconsistent with the terms of the Compacts.

The same flaws fatally infect SCOTWINC's contention that if the State cannot impose its license fee on wagers accepted at the Tribal facilities, the amounts deducted for such fees would be "surplus revenue to be divided equally between the applicable racing association and the horsemen." Because the Compacts require that money otherwise distributable to the State as a license fee must be paid over to the Tribes, there is no "surplus revenue" to be divided between the applicable racing association and the horsemen.

The California Horse Racing Board has been authorized by the Legislature to represent the State in

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[3] This assessment is to be separately negotiated between the State and the Tribes. The manner in which payment will be made is to be resolved in those negotiations.

negotiating compacts with the Tribes concerning horse-racing activities. Bus. & Prof. Code §19445. Each of the compacts now in effect was negotiated by the CHRB with the able assistance of the Attorney General; each was signed by the Governor; and each was approved by the Secretary of the Interior pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §2710(d). Thus, as a matter of both State and federal law, those compacts now control the conduct of simulcast wagering activities on the Indian lands of the signatory Tribes, and under both the Supremacy Clause of the U.S. Constitution, Art. VI, Cl. 2, and the laws and regulations of the State of California, those compacts apply to and are binding on SCOTWINC, the racing associations, the racing fairs and the horsemen.

For all of the reasons set forth above, we look forward to promptly receiving from SCOTWINC new Agreements that continue to include Section 5(b), so as to ensure no interruption in the constructive working relationship that the parties heretofore have developed and maintained. If you feel that a meeting among legal counsel would help to resolve this issue, please let us know, and we would be happy to help coordinate such a meeting.

Very truly yours,

ALEXANDER & KARSHMER

/s/ George Forman
George Forman

GF:ab
cc: Art Bunce, Esq.
Glenn Feldman, Esq.